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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

RALPH AH SAM, RAYMOND F. DUFFINA,
RICHARD J. KARASAKI, RICHARD Y. C. LAU,
and EDWIN PREGILL,
Petitioners

v.

THE UNITED STATES,
Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTIONS PRESENTED

1. Whether the applicable provisions of law should be construed to allow inclusion of cost-of-living allowances (COLA) in determining rates of basic pay for federal General Schedule (GS) employees, contrary to the basic statutory analysis in *United States v. Clark*, 454 U.S. ——, 108 S. Ct. 805 (1982).

2. Whether the applicable provisions of law should be construed to subject GS employees receiving COLA to different treatment from that accorded all other similarly situated GS employees not receiving COLA.

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THE UNITED STATES,
Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The opinion of the Court of Claims, not yet officially reported, appears at 599 F.2d 411 (1982) and in the Appendix.

JURISDICTION

The judgment of the Court of Claims was entered on May 19, 1982. An order extending time to file the petition for certiorari from August 17, 1982 to September 16, 1982 was granted by the Chief Justice on August 10, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1255.

STATUTES INVOLVED

In pertinent part, the fifth amendment to the United States Constitution states: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . ."

In pertinent part, 5 U.S.C. § 5334(a), the "highest previous rate" rule states:

> The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission] in conformity with this subchapter and chapter 51 of this title when—
>
> (1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;
>
> . . . . .
>
> (6) his employment status is otherwise changed; or
>
> (7) his position is changed from one grade to another grade.

In its entirety, 5 U.S.C. § 5333(b) states:

> Under regulations prescribed by the Office of Personnel Management [formerly the Civil Service Commission], an employee in a position to which this subchapter applies, who regularly has responsibility for supervision (including supervision over the technical aspects of the work concerned) over employees whose pay is fixed and adjusted from time to time by wage boards or similar administrative authority as nearly as is consistent with the public interest in accordance with prevailing rates, may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate for his grade, as provided by the regulations.

In its entirety, 5 U.S.C. § 5941(a) states:

> Appropriations or funds available to an Executive agency, except a Government controlled corporation, for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees. The allowance is based on—
>
> (1) living costs substantially higher than in the District of Columbia;

(2) conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or

(3) both of these factors.

The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies.

STATEMENT OF THE CASE

Petitioners are or were civilian employees at the Pearl Harbor Naval Shipyard in Hawaii who were transferred or promoted prior to June 26, 1974 from "blue collar" positions payable under the prevailing rate system (WS) to "white collar" supervisory positions payable under the General Schedule (GS) and who thereafter supervised their former fellow WS employees.

By virtue of this transfer or promotion from WS to GS positions, petitioners were entitled to a rate of basic pay governed by 5 U.S.C. § 5334(a), the "highest previous rate" rule. This statutory rule, and its implementing regulations, allows an employee to be paid at a rate which does not exceed his highest previous rate, provided that, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. 5 C.F.R. § 531.203(c) (1974).

Because petitioners supervised WS employees, they were also entitled to a rate of basic pay exceeding the highest rate paid to regularly-supervised WS subordinates under 5 U.S.C. § 5333(b), the "highest-paid subordinate" rule. Both statutes are part of the uniform nationwide GS pay system. 5 U.S.C. § 5331 *et seq.* GS employees in Hawaii also receive a cost-of-living allowance (COLA) in accordance with 5 U.S.C. § 5941.

Before June 26, 1974, the Department of the Navy, complying with its interpretation of the pertinent statutes and regulations, added COLA to the rate of basic pay of GS employees in all pay comparisons made under the two statutes. The net effect of this action was, of course, to award petitioners a lower initial rate of pay and a lower rate *vis-a-vis* their WS subordinates than if COLA had not been added for pay comparisons. From June 26, 1974, the COLA of Hawaii's GS employees was excluded from comparisons made under subsection 5334(a) but maintained for those performed under subsection 5333(b). Department of the Navy Civilian Manpower Management Instruction 531(S2-4)b(2) (1974). Since petitioners were transferred or promoted from WS to GS positions before June 26, 1974, the reversal of policy was not applied to them.

Petitioners and others filed a group grievance contesting the consideration of COLA for these purposes with the Shipyard Commander for submission to the Civil Service Commission. The Office of Civilian Manpower Management of the Navy Department submitted an inquiry to the Civil Service Commission which upheld the Government's interpretation. Petitioners then filed suit in the United States District Court for the District of Hawaii on May 25, 1977. The basis of federal jurisdiction was 28 U.S.C. § 1346.

Upon petitioners' motion to transfer the suit to the United States Court of Claims with respect to five of the eight plaintiffs and the Government's concurrence therewith, this case was transferred to that court on August 1, 1979, pursuant to 28 U.S.C. § 1406(c). The Court of Claims also had jurisdiction under 5 U.S.C. § 5596. Petitioners alleged that the Government's inclusion of COLA violated 5 U.S.C. §§ 5334(a), 5333(b), and 5334(b) and their implementing regulations, and deprived petitioners of their right to equal protection of the law since they were irrationally discriminated against *vis-a-vis* all GS employees not receiving COLA.

In a 2-1 decision, the Court of Claims denied the petition, holding that the agency's interpretation prevailed since nothing in the relevant statutes forbids the use of COLA to establish the rate of basic pay for a GS employee. (Pet. App. at 10a-11a.) The court also held that there was no constitutional violation because: (1) the Government had merely changed its interpretation with respect to subsection 5334(a), and (2) the Government could properly consider COLA for subsection 5333(b) purposes since WS rates contain a cost-of-living factor equivalent to COLA. (Pet. App. at 18a-20a.) Petitioners' subsection 5334(b) claim was rendered moot by *United States v. Clark*, 454 U.S. ——, 102 S.Ct. 805, 70 L.Ed.2d 768 (1982).

REASONS FOR GRANTING THE WRIT

I

This case presents an important question as to the proper interpretation of the governing federal statute fixing the rate of basic pay to which federal GS employees are entitled under 5 U.S.C. § 5331 *et seq.* Petitioners are former WS employees who were transferred or promoted to GS supervisory positions over their former fellow WS employees. By reason of such action, petitioners were entitled to salary increases under 5 U.S.C. § 5334(a), the "highest previous rate" rule and 5 U.S.C. § 5333(b), the "highest-paid subordinate" rule. The specific issue of law is whether the Government may add COLA to the petitioners' rate of basic pay for purposes of determining their entitlement to a salary increase under the two statutory rules.

Only last term this Court addressed the related issue of whether federal WS employees who are promoted to GS positions are entitled to a two-step pay increase under 5 U.S.C. § 5334(b), the "two-step increase" rule.[1] This

[1] Subsection 5334(b) provides that:

> An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate

Court held that such employees were not entitled to the increase, reversing the judgment of the Court of Claims, *United States v. Clark, supra.*[2]

Writing for a unanimous Court, Justice O'Connor held that the meaning of the word "grade" in subsection 5334 (b) is determined by 5 U.S.C. § 5102(a)(5). That section defines a grade as those positions sufficiently similar to "warrant their inclusion within one range of rates of basic pay in the General Schedule." In consequence, the Court held, § 5334(b) applies only to promotions to a higher grade in the General Schedule. (*United States v. Clark*, 108 S.Ct. at 809, 70 L.Ed.2d at 773).

In accord with *Clark*, petitioners believe that the determination of their rate of basic pay is governed by the General Schedule, as required by 5 U.S.C. § 5102(a)(5). That subsection plainly requires that the rate of basic pay of a GS employee is that appearing in the General Schedule (5 U.S.C. § 5332)—nothing more and nothing less. Just as with the "two-step increase" rule, the closely related "highest previous rate" and "highest-paid subordinate" rules must be governed by the rate of basic pay set forth in the General Schedule. This conclusion appears inescapable from *Clark*. The Government's attempt to add COLA to petitioners' rate of basic pay to determine their entitlement to increases under these statutory rules is logically irreconcilable with *Clark*,[3] in which the Court

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of the higher grade which exceeds his existing rate of basic pay by not less than two-step increases of the grade from which he is promoted or transferred. . . ."

[2] Since the petitioners in this case had raised a "two-step increase" claim which conceivably could have rendered their other claims moot, the Court of Claims stayed its decision pending the outcome of *Clark*.

[3] The Court in *Clark* was not called upon to examine the "highest previous rate" rule, but noted that the General Accounting Office has consistently determined that that rule governs transfers or promotions from a WS to a GS position. (108 S.Ct. at 812 n.16).

carefully delineated the basic purposes and scope of the GS system.

Heedless of the authoritative analysis contained in this court's opinion in *Clark*, the Court of Claims held it permissible to add COLA to the rate of basic pay to determine entitlement to salary increases under the "highest previous rate" rule, subsection 5334(a), and the "highest-paid subordinate" rule, subsection 5333(b). The Court of Claims fell into error because it relied on the agency interpretation—which, of course, is not binding if inconsistent with the provisions or policy of the applicable statute. That is the case here. 5 U.S.C. §§ 5334(a), 5333(b).[4]

The statutory interpretation of the Court of Claims casts a cloud upon the broad fundamental precepts of the GS pay system. It impairs the integrity of the rates of basic pay accorded federal GS employees as established by the General Schedule. It authorizes the Governmment to consider impermissible extraneous factors neither contemplated nor authorized by Congress in determining pay adjustments and entitlements of federal GS employees. It flies in the face of the analysis of the statute made by this Court in *Clark*.

II

The opinion of the Court of Claims places an unwarranted and discriminatory penalty upon GS employees who receive COLA. In the continental United States, GS employees receive salary adjustments under both the "highest rate" and "highest-paid subordinate" rules based solely upon their rates of basic pay as set by the General Schedule. Petitioners, and other federal employees who receive COLA, are denied these increases received by all other GS employees with exactly the same rates of basic

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[4] The agency interpretation also violates the plain meaning of the regulations themselves. *E.g.*, 5 C.F.R. §§ 531.202(i), 531.203(c), 531.302(b), 531.304(a) and (d) (1974).

pay because of the use of COLA in determining their entitlement to these increases. Congress never intended COLA to be used for this purpose.[5]

This disparate treatment violates the petitioners' right to the equal protection of the laws. In order for such distinctions between similarly situated groups to withstand constitutional scrutiny under the equal protection clause there must be a rational basis for the differential treatment. *Dandridge v. Williams*, 397 U.S. 471 (1970).

In its attempt to find a rational basis for the unequal treatment accorded the petitioners, the Court of Claims laid great stress upon the contention that WS pay rates necessarily include a cost-of-living allowance. Thus, the court reasoned, by adding COLA to the GS rate of basic pay and comparing the total to the WS rate, the Government compares "equivalents." As the dissenting judge points out, the court's assertion is completely without authority. (Pet. App. at 23a-25a.)

Thus, the error of the Court of Claims with respect to the permissible purposes of COLA is compounded by its unexplained, and inexplicable, conclusion that COLA and an undefined factor in WS wages are equivalents.

III

If the opinion of the court below is allowed to stand unreviewed, the novel and important issues of federal

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[5] Federal employees "stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute" are presently entitled to COLA. 5 U.S.C. § 5941(a). The explicit purposes of COLA are to compensate these employees at higher levels where living costs are high and/or as a recruitment incentive (*id.*), and not to be included in the rate of basic pay for determining pay adjustments. *See, e.g., Shadduck v. United States*, 142 Ct. Cl. 516, (1958); *Kalv v. United States*, 128 Ct. Cl. 207, 124 F. Supp. 654 *passim* (1954); *Curlott v. Campbell*, 598 F.2d 1175, 1177 (9th Cir. 1979), *modifying Curlott v. Hampton*, 438 F. Supp. 505 (D.Alas. 1977); Federal Personnel Manual (FPM) 591(4-1) d(1) (1963); FPM(4-1)d(1) (1969) (currently in effect).

statutory law raised by this case will in all likelihood recur. The Court of Claims is the often final arbiter of pay disputes involving the United States. *See* 28 U.S.C. § 1491 and 5 U.S.C. § 5596. The precedent established in this case represents an unwarranted disruption of heretofore-settled law with respect to the GS, COLA, and WS statutory schemes. Nor is it likely that conflicts among the circuits will arise since, even if claimants pursue their remedies initially in the federal district courts, such cases are often transferred, as here, to the Court of Claims. *See* 28 U.S.C. § 1406(c). The law, as decided in the court below, if not reversed by this Court, will remain to visit potentially vast disruption upon the nationwide federal pay system.

CONCLUSION

The GS pay system is a uniform, nationwide statutory scheme, *United States v. Clark*, *supra*. Petitioners, although subject to that system, have been accorded rates of basic pay, defined by the General Schedule, at variance with identically-situated federal employees not receiving COLA. This action is based upon clearly erroneous and potentially definitive statutory interpretations of the GS rate of basic pay in contravention of *Clark*, *supra*, and of congressional mandates with respect to the permissible scope and purposes of WS wage rates and COLA.

The Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 352-79C

(Decided May 19, 1982)

RALPH AH SAM, RAYMOND F. DUFFINA, RICHARD J. KARASAKI, RICHARD Y. C. LAU, and EDWIN PREGILL

v.

THE UNITED STATES

Renton Nip for plaintiffs. *Walter G. Chuck*, attorney of record. *Allison H. Lynde*, of counsel.

Robert Giertz, with whom was *Assistant Attorney General Alice Daniel*, for defendant.

Before DAVIS, NICHOLS and KASHIWA, *Judges*.

ON PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

NICHOLS, *Judge*, delivered the opinion of the court:

This civilian pay case is before the court on the parties' cross-motions for summary judgment. There being no factual dispute, the court is asked to determine whether

prevailing rate wage employees who were promoted to General Schedule supervisory positions before June 26, 1974, are entitled to a further increase in wages under 5 U.S.C. §§ 5333 and/or 5334 and their implementing regulations. To the extent that this question has not been reached by the recent Supreme Court decision of *United States* v. *Clark*, 454 U.S. ——, 50 U.S.L.W. 4128 (1982), we hold that these federal employees are not entitled to a further increase in wages under either statute.

I

The case at bar involves two totally separate federal pay systems, namely the prevailing rate wage (WS) and General Schedule (GS) systems. An understanding of the interplay between these two systems is necessary before plaintiffs' claim for increased wages can be reviewed. The GS system, governed by 5 U.S.C. § 5331 *et seq.*, is a nationwide pay system divided into numbered grades and applicable to federal "white collar" employees. *See United States* v. *Clark*, *supra*. The numbered grades are further divided into "steps" up which the employee travels with longevity on the job. 5 U.S.C. § 5332. "The salary for each step of each grade in the GS is uniform nationwide." *United States* v. *Clark*, *supra*.

On the other hand, pay rates for comparable work under the WS system may vary nationwide. This is so because the WS, which applies generally to "blue collar" employees, provides that employees are to be paid at the *local* prevailing rate for comparable work. 5 U.S.C. § 5343. As prices in different geographic areas vary, so, too, do pay rates for comparable work. In some areas, the prevailing rate is so high that WS employees may earn more than the GS employees who supervise them, creating what is known as a "pay inversion."

In Title 5, Congress took steps to lessen the impact of "pay inversion" on GS employees. Section 5334, which applies to the initial setting of pay for GS employees

whose positions have been changed in some manner, specifies the appropriate methods for calculation of the new wage rates. Section 5334 applies to all GS employees regardless of whether they serve in a supervisory capacity. Subsection 5334(a), through its implementing regulations, authorizes calculation of wages in accordance with the "highest previous rate" rule.[1]

Section 5334 applies to all GS employees, but subsection 5333(b) *only* applies to GS employees who occupy some supervisory role over WS subordinates. Subsection 5333 (b) provides further salary relief for some GS supervisors whose WS subordinates receive higher wages than they do.[2] Thus, if the reader has followed us so far, a

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[1] Subsection 5334(a) states, in part:

"(a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Civil Service Commission [now the Office of Personnel Management] in conformity with this subchapter and chapter 51 of this title when—

"(1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply;

* * * * *

"(6) his employment status is otherwise changed; or

"(7) his position is changed from one grade to another grade."

Congress, in enacting § 5334(a), directed the Civil Service Commission (CSC) to adopt regulations governing the establishment of initial pay rates for GS employees. In compliance therewith, CSC adopted 5 C.F.R. § 531.203(c) (1974) which states:

"(c) *Position or appointment changes.* Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate." * * *

[2] Subsection 5333(b) states:

"(b) Under regulations prescribed by the Civil Service Commission [now Office of Personnel Management], an employee in a position to which this subchapter applies, who regularly has responsibility for supervision (including supervision over the technical

former WS employee promoted to a GS supervisory position over his previous position, as here, has two sets of entitlements by statute: to maintenance of his basic pay

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aspects of the work concerned) over employees whose pay is fixed and adjusted from time to time by wage boards or similar administrative authority as nearly as is consistent with the public interest in accordance with prevailing rates, may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate for his grade, as provided by the regulations."

As it did with § 5334(a), Congress directed the CSC to enact implementing regulations. In accordance therefore, CSC promulgated 5 C.F.R. §§ 531.303-531.305 (1974), pertinent portions of which state:

"§ 531.303 Use of authority.

In determining whether to use the authority under section 5333(b) of title 5, United States Code, and this subpart, an agency shall consider (a) the relative rate-ranges of the supervisor and the wage board employee supervised by him as well as the specific rate either is receiving at the time, and (b) the equities among supervisors in the same organizational entity as well as the equities between the supervisor and the wage board employee supervised by him.

"§ 531.304 Requirements for entitlement.

(a) *Basic.* Before an agency may adjust the pay of a supervisor under section 5333(b) of title 5, United States Code, and this subpart, it must find that (1) the supervisor regularly has responsibility for supervision (which must include supervision over the technical aspects of the work concerned) over one or more wage board employees, and (2) the rate of basic pay for the supervisor is less than the rate of basic pay for the wage board employee supervised by him.

* * * * *

(d) *Rate of basic pay.* (1) In comparing the rate of basic pay for a supervisor with the rate of basic pay for a wage board employee supervised by him, an agency shall exclude from the wage board employee's rate (i) any irregular prevailing rate, such as a retained rate not related to his current position, and (ii) night differential.

* * * * *

"§ 531.305 Adjustment of rates.

(a) *Rate payable to supervisor.* (1) Except as provided in subparagraph (2) of this paragraph, when an agency decides to adjust the rate of pay for a supervisor under section 5333(b) of title 5,

at his highest previous rate (section 5334(a) and regulations) and also to basic pay above his new subordinate's pay (section 5333(b)).

In addition to the relief afforded under §§ 5333 and 5334, all GS employees, who are employed in certain areas outside the continental United States, are entitled to receive cost-of-living allowances (COLA) on top of their regular salaries. 5 U.S.C. § 5941. WS employees are not, as their prevailing wage is based on the cost-of-living.

The instant case requires a determination of the proper treatment of COLA in relation to the calculations made under §§ 5333 and 5334. Briefly stated, before June 26, 1974, the impact of COLA was considered by the Navy in all comparisons made under §§ 5333(b) and 5334(a). After June 26, 1974, COLA was excluded from comparisons made under §§ 5334(a) but maintained for those comparisons performed under § 5333(b). This distinction is critical and its importance will become evident in parts II and III.

Plaintiffs, in this case, are or were civilian employees at the Pearl Harbor Naval Shipyard in Hawaii. Plaintiffs were either promoted or transferred from WS positions to GS supervisory positions. Plaintiffs were, therefore, entitled to salary relief under 5 U.S.C. § 5334 solely by virtue of their transfer into the GS system. Because they

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United States Code, and this subpart, it shall adjust his rate of pay to the nearest rate (but not above the maximum rate) of his grade which exceeds the highest rate of basic pay (excluding night differential) paid to any wage board employee for whom the supervisor regularly has responsibility for supervision.

(2) When a supervisor is in an area in which he receives a cost-of-living allowance or post differential based on hardship, and the wage board employee he supervises does not receive a separately stated cost-of-living allowance or post differential, the agency shall add to the supervisor's rate of basic pay his cost-of-living allowance or post differential and use the total to adjust his rate of pay under subparagraph (1) of this paragraph."

* * * * *

were appointed to GS supervisory positions, plaintiffs were also entitled to have their pay adjusted in accordance with 5 U.S.C. § 5333(b). Furthermore, GS employees in Hawaii receive COLA in accordance with 5 U.S.C. § 5941. When the promotions and/or transfers occurred before June 26, 1974, the Navy, in complying with its then current interpretation of both the pertinent statutes and regulations, took COLA into account in deciding whether plaintiffs were entitled to an increase in pay. The net effect of the Navy's actions was to award plaintiffs a lower salary than they would have otherwise received after June 26, 1974, when COLA was not taken into account.

Plaintiffs expressed their dissatisfaction with the pre-June 26, 1974 interpretation and application of the pertinent statutes and regulations to Naval authorities. Plaintiffs also filed a group grievance with the Civil Service Commission (CSC) and sought the aid of their elected representatives to Congress. Plaintiffs' efforts came to naught and, on May 25, 1979, plaintiffs filed suit in the United States District Court for the District of Hawaii. Upon plaintiffs' motion to transfer the suit to the Court of Claims with respect to five of the eight plaintiffs and defendant's concurrence therewith, this case was transferred to this court on August 1, 1979, pursuant to 28 U.S.C. § 1406(c).

Plaintiffs filed their petition in this court on September 25, 1979, alleging that defendant's inclusion of COLA in the calculation violated 5 U.S.C. §§ 5333(b) and 5334(a) and had deprived plaintiffs of their constitutional right to equal protection of the law. The parties moved for summary judgment and oral argument was heard on January 13, 1981. By this time, plaintiffs' claims had expanded to include an alleged violation of 5 U.S.C. § 5334(b),[3] an issue, if resolved in plaintiffs' favor, could con-

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[3] Subsection 5334(b) provides in pertinent part:

"(b) An employee who is promoted or transferred to a position in a higher grade is entitled to basic pay at the lowest rate of the

ceivably have rendered plaintiffs' other claims moot. This court had recently addressed this same issue in *Clark* v. *United States*, 220 Ct. Cl. 278, 599 F.2d 411 (1979), and had held that "the two-step increase" rule of § 5334(b) applied to all WS employees transferring to GS positions. On notice that the Supreme Court had granted certiorari to hear argument in *United States* v. *Clark*, we stayed our decision in the present case pending the Supreme Court's decision. On January 12, 1982, the Supreme Court reversed our decision in *Clark* and held that "the statute [§ 5334(b)] and the accompanying regulations reveal a congressional intent to apply the two-step increase provision of § 5334(b) only to promotions or transfers of employees already within the GS system." 454 U.S. at ——, 50 U.S.L.W. at 4129. Accordingly, plaintiffs' claim for relief under 5 U.S.C. § 5334(b) must be denied. Plaintiffs' other claims must now be addressed.

II

At the outset, it must be noted that plaintiffs' claims for relief under 5 U.S.C. §§ 5333(b) and 5334(a) are not alternative grounds for recovery but are, in fact, separate and distinct legal entitlements for which plaintiffs could recover under either, all, or none of these theories. Accordingly, claims under §§ 5333(b) and 5334(a) will be dealt with separately. For the following reasons, we determine that plaintiffs are not entitled to recover under either § 5333(b) or 5334(a).

In applying the highest previous rate rule of 5 U.S.C. § 5334(a) and its implementing regulation, 5 C.F.R. § 531.203(c),[4] the Navy initially compared the employee's highest previous rate earned in the WS system with the rate established for the GS position, plus the COLA to which that employee would be entitled. If the employee's

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higher grade which exceeds his existing rate of basic pay by not less than two-step increases of the grade from which he is promoted or transferred." * * *

[4] *Supra* note 1.

highest previous rate exceeded the total of the GS salary plus COLA, the Navy would then raise the employee's rate of basic pay to a corresponding step at which level the GS salary plus COLA would exceed the employee's highest previous rate. At no time, however, did the Navy raise the employee's rate of basic pay to a level that would place him in a higher grade. After June 26, 1974, the Navy changed its interpretation of 5 C.F.R. § 531.203(c) and excluded the impact of COLA from its comparison. It is important to note that the Navy did not amend § 531.203(c), as of course it could not, but merely changed its interpretation of the pertinent section. This change in interpretation had the net effect of awarding higher overall wages to those WS employees who were promoted to GS positions after June 26, 1974.

The following example graphically portrays the effect of the Navy's change in interpretation:

$ 9.47	GS basic pay rate
1.42	COLA
$10.89	TOTAL
$ 9.94	Highest previous rate earned under WS.

Under the pre-June 26, 1974 interpretation, the GS employee would not be entitled to a higher starting pay rate because his or her GS basic pay plus COLA exceeded the employee's highest previous rate received under WS. After June 26, 1974, the Navy excluded COLA from the comparison under 5 U.S.C. § 5334(a). Referring to our example, the GS basic pay rate was less than the employee's highest previous rate under WS; an upward adjustment in basic pay would then be appropriate.

In their submissions to this court, neither party has devoted much attention to arguments involving 5 U.S.C. § 5334(a). Both parties have, instead, argued that 5 U.S.C. § 5333(b) is the controlling statute and have addressed § 5334(a) as a peripheral matter. The court finds the lack of discussion concerning § 5334(a) to be

curious considering the Navy's change in interpretation *only* involved the setting of pay rates under § 5334(a). The court, therefore, believes that a thorough discussion of § 5334(a) is essential to a final decision in this case.

Plaintiffs argue that the Navy's pre-June 26, 1974 interpretation violates both the plain meaning of § 5334 and its implementing regulations. Plaintiffs also contend that the Navy's pre-June 26, 1974 interpretation contradicts congressional intent in enacting § 5334(a). Finally, plaintiffs argue that the pre-June 26, 1974 interpretation violates plaintiffs' constitutional right to equal protection as guaranteed by the fifth amendment. Plaintiffs' constitutional argument is based upon the difference in treatment that occurred with respect to those WS employees promoted to GS positions before June 26, 1974, such as plaintiffs, and those similarly situated employees promoted after June 26, 1974. Plaintiffs also add that they have been treated differently from those WS employees who were employed in non-COLA areas and promoted to GS positions. Plaintiffs state that the difference in treatment is evident not only in salaries, but also in retirement benefits and insurance.

Defendant argues that the Navy's change in interpretation should be applied only prospectively, citing *Fairchild Engine and Airplane Corp.* v. *United States*, 152 Ct.Cl. 352, 285 F.2d 131 (1961); *A. J. Myers* v. *United States*, 180 Ct.Cl. 521, 378 F.2d 696 (1967). Defendant further argues that because CSC had impliedly ruled that the Navy's pre-June 26, 1974 interpretation of 5 C.F.R. § 531.203(c) was accurate, the change in interpretation should not be given retroactive effect.

In subsection 5334(a), Congress gave broad authority to the CSC to prescribe regulations governing the appropriate rate of basic pay to which a GS employee would be entitled upon his or her promotion or transfer. In accordance with Congress' directive, the CSC promulgated the "highest previous rate" rule of 5 C.F.R. § 531.203(c). Neither the statute nor the regulation refer to the matter

at issue here, whether COLA is to be included in the calculation performed under 5 C.F.R. § 531.203(c). It is solely the Navy's pre-June 26, 1974 interpretation which would include COLA in the calculation.

Great weight is to be given to an agency's interpretation of a regulation even though the agency conclusion is not the only reasonable one or even one the court would have reached if the question had arisen in the first instance in judicial proceedings. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Nabisco, Inc.* v. *United States*, 220 Ct.Cl. 332, 340, 599 F.2d 415, 419 (1979); *Sarcena* v. *United States*, 206 Ct.Cl. 90, 95, 508 F.2d 1333, 1336 (1975); *Port Authority of Saint Paul* v. *United States*, 193 Ct.Cl. 108, 120, 432 F.2d 455, 461 (1970).

In *Udall* v. *Tallman*, the Supreme Court went on further to say:

> Since this [case] involves an interpretation of an administrative regulation a court must necessarily look to the adminstrative consideration of the regulation if the meaning of the words used is in doubt. • • • [T]he ultimate criterion is the administrative interpretation which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation. [380 U.S. at 16-17 (citing *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945)).]

In the instant case, the Navy's interpretation of the regulation to include COLA in the calculation performed under 5 C.F.R. § 531.203(c) is clearly neither erroneous nor in conflict with the regulation or statute. The statute, § 5334(a), refers to the setting of initial rate of basic pay. "Rate of basic pay," a technical term, is defined, by regulation, as "the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and exclusive of additional pay of any kind." 5 C.F.R. § 531.202(i). By definition "rate of basic pay" excludes COLA, as COLA is defined as an al-

lowance under 5 C.F.R. § 591.201(e). By referring to "rate of basic pay" in § 5334(a), Congress obviously intended to use the term to establish wages in accordance with the GS rates set by statute. Nothing, however, in § 5334(a), and this is where plaintiffs' theory fails, dictates that COLA cannot be used to compute or establish the rate of basic pay to which a GS employee would be entitled.

Similarly, § 5334(a)'s implementing regulation, 5 C.F.R. § 531.203(c), does not prohibit COLA from consideration. Section 531.203(c) refers to pay at rate of grade. While rate of grade is not defined, it can be safely assumed to mean a range of pay rates that correspond to a GS grade. The regulation, however, speaks to establishment of a pay rate and not to whether COLA is to be included or excluded in performing the mechanics of the comparison. Because neither the statute nor the regulation prohibits or requires the inclusion of COLA in setting the GS employee's rate of basic pay, the agency's interpretation prevails.

Further support for the reasonableness of the Navy's pre-June 26, 1974 interpretation can be found when one considers what pay rates are being compared. WS pay rates are based upon the prevailing rate in a specific geographic area. By operation, WS pay rates necessarily include a cost-of-living allowance. GS basic pay rates do not include COLA. Therefore, by adding COLA to the GS pay rates and then comparing the total to the WS pay rate, the Navy is comparing equivalents.

Nor does the Navy's pre-June 26, 1974 interpretation violate the guiding principle of "equal pay for substantially equal work" as stated in 5 U.S.C. § 5301. The Navy's pre-June 26, 1974 interpretation supplements the mandates of 5 U.S.C. § 5334(a) and 5 C.F.R. § 531.203(c) which merely provide that an employee transferred or promoted to one GS system will earn an equivalent or in-

creased salary. If the GS position requires a greater degree or amount of work, this fact will then be reflected in the GS grade and rate of pay assigned to that position. If the position requires only equal work, the GS grade and rate of pay assigned to that position will reflect this fact. The Navy's pre-June 26, 1974 interpretation does not affect the assignment of grade and rate of pay to a position. It merely provides the means of ensuring that an employee will not be harmed in transferring from the WS pay scale to the GS pay scale.

Plaintiffs argue that because the Navy has effectively recognized the alleged error of its ways and corrected its interpretation of 5 U.S.C. § 5334(a), the new interpretation should be given retroactive effect and applied to them. Defendant counters that the general rule that statutes are to be given prospective application unless otherwise stated should be analogized to the instant case. While we refuse to go as far as defendant would have us do, we agree that the post-June 26, 1974 interpretation should not be given retroactive effect. Furthermore, we express no opinion as to the validity of the Navy's post-June 26, 1974 interpretation.

What the post-June 26, 1974 interpretation effectively did was to overrule the Navy's earlier interpretation. This fact is of utmost importance in determining retroactive application of regulations and agency interpretations of them. *See Anderson, Clayton & Co.* v. *United States*, 562 F.2d 972, 981-84 (5th Cir. 1977), *cert. denied*, 436 U.S. 944 (1978). Ordinarily, if a new regulation or interpretation merely recites settled prior law or policy, then retroactive application of the regulation or interpretation is proper. If, however, the new regulation or interpretation overrules prior law or policy, the new regulation or interpretation will not, depending on various factors, be given retroactive effect. This distinction is obviously grounded upon notions of fairness to the involved parties.

In the instant case, the Navy's post-June 26, 1974 interpretation did not recite settled prior law or policy. It effectively overruled prior policy. Thus, it should not be given retroactive effect. If the new interpretation would somehow have caused injury to plaintiffs if applied retroactively, plaintiffs would have undoubtedly argued against retroactive application. Merely because the new interpretation would benefit plaintiffs should not, in itself, supply the grounds for retroactive application.

III

Now we turn to subsection 5333(b) and its implementing regulations which are expressly limited to GS supervisors whose WS subordinates earn more than they do. Because plaintiffs were promoted to GS positions supervising WS subordinates, subsection 5333(b) applies to them.

In applying § 5333(b) and its implementing regulations, the Navy has consistently compared the rate of pay received by the highest paid subordinate with the *total* remuneration received by the GS supervisor, *i.e.*, basic pay plus COLA. No change in interpretation with respect to § 5333(b) and its implementing regulations occurred on June 26, 1974. Throughout the relevant time period, the Navy's manner of performing the comparison has not wavered. The Navy's change in interpretation with respect to § 5334(a) has, of course, had an impact on the supervisor's rate of basic pay even without a change under § 5333(b). Because the supervisor's pay rate is now theoretically set at a higher rate initially under § 5334(a) than before, the supervisor may now receive a higher pay rate (assuming his highest paid subordinate earns more than he) than plaintiffs who were promoted to supervisory positions before June 26, 1974.

The following table depicts the effect the Navy's change in interpretation with respect § 5334(a) has on § 5333(b):

Pre-June 26, 1974—

Calculations under § 5334(a):

$ 9.47	GS basic pay rate
1.42	COLA
$10.89	TOTAL
$ 9.94	Highest previous rate earned under WS.

Because the total of GS basic pay rate plus COLA exceeds the employee's highest previous rate, no adjustment is needed. A comparison of this pay rate with that of the highest paid subordinate must now be performed under § 5333(b).

$10.89	GS basic pay rate + COLA
10.50	Highest subordinate pay rate under GS.

Because the highest subordinate earns less than the GS supervisor, no adjustment in pay will be made.

Post-June 26, 1974—

Calculations under § 5334(a):

$ 9.47	GS basic pay rate
9.94	Highest previous rate earned under WS.

Adjustment made to GS basic pay rate to $10.00.

Because the GS employee's basic pay was less than the highest previous rate earned under the WS system, an adjustment was required. Assume for illustrative purposes that $10.00 was the next highest GS rate of pay. A comparison of this pay rate with that of the highest paid subordinate must now be performed under § 5333(b).

$10.00	GS basic pay rate
1.42	COLA[5]
$11.42	TOTAL
$10.50	Highest subordinate pay rate under WS.

[5] COLA is calculated as a percentage of the basic pay. For our purposes, though, it will remain a fixed figure.

Because the highest paid subordinate earns less than the GS supervisor, no adjustment will be made. The GS supervisor who is promoted after June 26, 1974, will, however, be paid more due to the impact on § 5333(b) of the change in interpretation of § 5334(a).

Understandably, plaintiffs complain of unfairness. Their legal arguments with respect to § 5333(b) are, however, without merit. Basically, plaintiffs argue that the Navy's inclusion of COLA in the comparison violates the plain meaning of § 5333(b) and its implementing regulations.

Plaintiffs argue that under § 5333(b) and its implementing regulations, a GS supervisor's basic pay rate should be compared to the pay rate of his highest subordinate. If the GS pay rate is below that of his subordinates, a pay adjustment is required. *See* 5 C.F.R. § 531.305(d).[6] To compute the adjustment, plaintiffs would add the cost of COLA to the supervisor's rate of basic pay. The total remuneration would then be keyed to the nearest GS pay rate, which would then become the new basic pay rate for the supervisor. The supervisor then would be entitled to COLA on the basis of his new basic pay rate. *See* 5 C.F.R. § 531.305(a)(2).[7] Plaintiffs argue that their theory is the only plausible interpretation of the regulations and statutes read as a whole.

Under plaintiffs' theory, the calculation would be performed in the following manner:

1. Assume basic pay set at $10.00 under § 5334(a).

2. Comparison of GS basic pay with pay rate of highest paid subordinate:

$10.00 GS basic pay rate
$10.50 WS pay rate

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[6] *Supra* note 2.

[7] *Supra* note 2.

3. Because GS pay rate below that of WS subordinate, an adjustment is required.

4. Adjustment is performed by adding COLA to basic pay rate:

$10.00	GS basic pay rate
1.42	COLA
$11.42	TOTAL

The total is then keyed to the nearest pay rate.

5. Assume nearest pay rate is $11.50, $11.50 would then become the new basic pay rate to which COLA would then be added:

$11.50	New GS basic pay rate
1.42	COLA
$12.92	TOTAL

6. New total pay rate would be $12.92.

While it is true that some of the language used in the regulations, particularly language referring to rate of basic pay, would appear to support plaintiffs' theory, we believe plaintiffs' approach is a narrow one. It must be remembered that 5 C.F.R. § 531.305(a)(2) was a subsequent addition to the regulations. Before § 531.305(a)(2) was added in 1967, the regulations did not refer to whether COLA was to be used in computing any adjustment to a supervisor's salary. The regulations merely contemplated adjustments to supervisor's salaries in those areas where GS personnel did not receive COLA. In 1967, provision was made, by way of § 531.305(a)(2), to include the cost of COLA in those areas where GS employees received the allowance. Hence, the language of the regulations must be read in this light.

In addition, it should be noted that 5 C.F.R. § 531.303 [8] refers to the equities of the situation between super-

[8] *Supra* note 2.

visors and wage board subordinates. The equities are not met if a comparison of only GS basic pay rates with wage board salaries is performed. Wage board salaries inherently reflect a cost-of-living allowance. Equivalents must be compared and to do so, COLA must be added to the basic GS salary.

Equities would also not be met if plaintiffs' theory was to be adopted. Under plaintiffs' theory, the cost of COLA is included in the calculation twice. No authority exists in either the regulations or the statute for this proposition.

Finally, CSC, the agency responsible for drafting 5 C.F.R. §§ 531.304, 531.305, approved the Navy's interpretation of these same regulations. As we have said before, an agency's interpretation of its own regulations is to be given great weight unless the questioned interpretation is clearly erroneous or inconsistent with the regulation or statute. *Udall* v. *Tallman, supra; Nabisco, Inc.* v. *United States, supra; Sarcena* v. *United States, supra; Port Authority of Saint Paul* v. *United States, supra.* In light of the Navy's consistent interpretation of § 5333 (b) and its implementing regulations, with CSC approval, the inclusion of COLA in the comparison performed under 5 C.F.R. § 531.305(a) (2) is clearly neither erroneous nor inconsistent.

IV

Plaintiffs also challenge the Navy's pre- and post-June 26, 1974 interpretations in that different classes of similarly situated persons were treated differently as violative of the fifth amendment's guarantee of equal protection. Defendant argues that this court lacks jurisdiction to hear claims based upon the equal protection clause of the fifth amendment because this constitutional provision does not obligate the Federal Government to pay money damages, citing *Carruth* v. *United States*, 224 Ct.Cl. ——,

——, 627 F.2d 1068, 1081 (1980). Defendant further argues that even if this court has jurisdiction over plaintiffs' constitutional claim, plaintiffs' claimed constitutional violation does not survive constitutional analysis.

This court does have jurisdiction to hear plaintiffs' equal protection claim. Plaintiffs' claim for money damages is based upon 5 U.S.C. §§ 5333(b) and 5334(a). Plaintiffs' equal protection challenge is based upon the Navy's interpretation of these statutes. Or put another way, plaintiffs' claim that the subject statutes, if correctly construed according to the fifth amendment, require this court to award money damages. This is precisely the type of claim over which this court has jurisdiction. *United States* v. *Testan*, 424 U.S. 392 (1976); *Gentry* v. *United States* 212 Ct.Cl. 1, 7, 546 F.2d 343, 346 (1976).

Plaintiffs' equal protection claim is based upon two situations in which similarly situated persons are being treated differently. The first situation involves the different treatment afforded to those WS employees promoted to GS supervisory positions prior to June 26, 1974, and those similarly situated persons promoted after June 26, 1974. Plaintiffs are, obviously, members of the former class. Plaintiffs also argue that WS employees promoted to GS supervisory positions prior to June 26, 1974, in COLA areas are being treated differently than similarly situated persons employed in non-Cola areas. Plaintiffs argue that these two situations in which different treatment is afforded to the classes violates equal protection guarantees.

With regard to plaintiffs' first attempt to invoke the protection of the equal protection clause, plaintiffs have failed to articulate a constitutional argument. Plaintiffs claim that by changing its interpretation of the pertinent statute and regulations, the Navy has treated similarly situated persons differently, *i.e.*, persons promoted before and after June 26, 1974. Plaintiffs have not cited this

court to any case in which any changes in interpretation or amendment of statutes or regulations gives rise to an equal protection challenge. Under plaintiffs' theory, any change, such as amendments to the minimum wage laws or amendments effecting decreases or increases in government entitlement benefits, would be subject to an equal protection challenge. This result is clearly absurd and would, if given support, effectively inhibit any legislative or other governmental body from amending its statutes or regulations. Our laws would become written in stone, thereby failing to account for changing times and changing demands of our citizens.

Plaintiffs' second equal protection claim is based upon the different treatment afforded two classes of similarly situated persons. One class is comprised of persons, such as plaintiffs, who were promoted to GS supervisory positions and had COLA included in the calculations made under 5 U.S.C. §§ 5333(b) and 5334(a). The other class includes those persons promoted to GS supervisory positions who, because they lived in non-COLA areas, did not have COLA included in the calculations. When a class is neither suspect nor semi-suspect or the right allegedly infringed upon is neither fundamental nor quasi-fundamental, a "minimum rationality standard is appropriate." *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 312-13 (1976); *See McDonald* v. *Board of Election*, 394 U.S. 802 (1969); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

Persons promoted to GS supervisory positions in COLA areas do not constitute a suspect or semi-suspect class. Nor is the right to employment and wages a fundamental or quasi-fundamental right. *See Massachusetts Board of Retirement, supra* at 313. Thus, the minimum rationality test is the appropriate one to apply in this case. Under minimum rationality "[i]f the classification

has some 'reasonable basis,' it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970) (citing from *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)).

Under this standard, it is clear that the inclusion of COLA, where applicable, under 5 U.S.C. §§ 5333(b) and 5334(a) is reasonable and, hence, constitutionally valid. Cost-of-living allowances are designed to offset the expense incurred by GS employees in living and working in high cost areas. WS pay rates, by their nature, reflect the cost-of-living. The Navy's inclusion of COLA in the calculation was reasonably designed to compare equivalents. Given the policy pronouncements of 5 C.F.R. § 531.303, this purpose is both reasonable and rational.

Moreover, in non-COLA areas, GS employees receive only their basic pay rate, while WS employees receive the prevailing rate. If an adjustment to a GS employee's salary is made under either 5 U.S.C. §§ 5333(b) or 5334(a), a comparison will be made of GS pay rates and WS pay rates. Because the cost-of-living is presumed to be significantly less in non-COLA areas, WS pay rates will reflect this fact and will be commensurately lower than their counterparts in COLA areas. Because of this fact, it is conceivable that plaintiffs would, despite the alleged injury suffered, receive higher wages than their counterparts in non-COLA areas, adequate to reflect the difference in cost-of-living.

V

For all of the above reasons, plaintiffs' motion for summary judgment is denied, defendant's cross-motion for summary judgment is granted, and plaintiffs' petition is dismissed.

KASHIWA, *Judge*, dissenting:

I respectfully dissent from the majority's decision.

The basic issue herein is whether the cost of living allowance (COLA) paid to federal workers in Hawaii must be considered as a "rate of basic pay" for purposes of other adjustments to General Schedule (GS) pay allowed by 5 U.S.C. § 5334(a) or 5 U.S.C. § 5333(b). Under 5 U.S.C. § 5334(a), an employee transferred to the GS pay system from the prevailing rate wage system (WS) may have his initial GS salary adjusted upwards if his "rate of basic pay" would not otherwise exceed his former WS wages. Under 5 U.S.C. § 5333(b), a GS supervisor's salary may be adjusted if the supervisor's "rate of basic pay" does not exceed the wages of the WS employees he supervises.

"Rate of basic pay" is defined as follows for purposes of both statutes:

> • • • "Rate of basic pay" means the rate of pay fixed by law or administrative action for the position held by an employee before any deductions and *exclusive of additional pay of any kind.* [5 C.F.R. § 531.202(i) (1974) (defining the phrase for 5 U.S.C. § 5334(a) purposes); emphasis supplied.]

Accord: 5 C.F.R. § 531.302(b) (defining the phrase for 5 U.S.C. § 5333(b) purposes). The rate of basic pay of plaintiff GS supervisors, as "fixed by law," is found in 5 U.S.C. § 5332, which is entitled "The General Schedule" and fixes by law the rate of basic pay of *all* GS employees. COLA is not included in the basic rate of pay "fixed" by 5 U.S.C. § 5332 and would therefore be a "kind" of "additional pay," not to be taken into account for either statutory adjustment. This conclusion seemingly is obvious, but there are several additional reasons why COLA is not a part of a GS employee's "rate of basic pay."

First, all GS employees in the 48 contiguous states, none of whom receives COLA, have basic rates of pay set by 5 U.S.C. § 5332. It is absurd to argue that plaintiffs somehow have a different rate of basic pay than all these other GS employees, for plaintiffs' compensation is governed by the same basic pay statute as all other GS employees.

Second, COLA is not and was never intended to be basic pay. The very nomenclature, "allowance," belies the argument that COLA is basic pay. Under 5 U.S.C. § 5941, COLA is clearly an allowance in *addition* to rates of basic pay fixed by statute:

> SUBCHAPTER IV.—MISCELLANEOUS ALLOWANCES
>
> § 5941. *Allowances based on living costs and conditions of environment; employees stationed outside continental United States or in Alaska.*
>
> (a) Appropriations or funds available to an Executive agency, except a Government controlled corporation for pay of employees stationed outside the continental United States or in Alaska whose *rates of basic pay* are fixed by statute, are available for allowances to these employees. The allowance is based on—
>
> (1) living costs substantially higher than in the District of Columbia;
>
> (2) conditions of environment which differ substantially from conditions of environment in the continental United States and warrant an allowance as a recruitment incentive; or
>
> (3) both of these factors.
>
> The allowance may not exceed 25 percent of the *rate of basic pay*. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the Presi-

> dent establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies. [Emphasis supplied.]

Although ignored by the majority, the case law interpreting 5 U.S.C. § 5941 and predecessor provisions has long recognized COLA is an allowance *additional to* the GS rate of basic pay. *E.g., Shadduck* v. *United States*, 142 Ct. Cl. 516, 517 (1958); *Kalv* v. *United States*, 128 Ct. Cl. 207, 124 F. Supp. 654 *passim* (1954); *Curlott* v. *Campbell*, 598 F.2d 1175, 1177 (9th Cir. 1979), *modifying Curlott* v. *Hampton*, 438 F.Supp. 505 (D. Alas. 1977).

Third, the COLA percentage can be adjusted up or down based on regulations prescribed by the President with respect to living costs substantially higher than those in the District of Columbia and as a recruitment incentive allowance. By its very nature, then, COLA is geared to factors which have nothing to do with basic compensation for work performed, duties, and qualifications.

Fourth, the Federal Personnel Manual (FPM) long has *specifically excluded* COLA from the definition of "rate of basic pay." *E.g.*, FPM 591(1)(1963); FPM 591(1)a(9) (1969) (currently in effect). Moreover, the FPM long has *specifically directed* that COLA is not to be included in the base used to determine "any additional pay." *E.g.*, FPM 591(4-1)d(1) (1963); FPM 591(4-1)d (1) (1969) (currently in effect).

Fifth, COLA received by Hawaii federal employees is subject to fundamentally different federal income tax treatment than is GS pay. GS compensation is fully includible as income and is thus fully *taxed*; under 26 U.S.C. (Internal Revenue Code of 1954, as amended) § 912(2), COLA paid to Hawaii federal employees is excluded from gross income and is fully *exempt from tax*. This, in my view, underscores the Congressional deter-

mination that there is a critical distinction between GS pay and COLA amounts.

Sixth, defendant itself has admitted COLA is not a part of the rate of basic pay by its reversal of policy in Civilian Manpower Management Instruction 531(S-4)b (2), effective June 26, 1974. Under that Instruction, defendant has eliminated consideration of Hawaii COLA in determining, under 5 U.S.C. § 5334(a), the initial rate at which a GS employee who has moved from a WS position should be paid. Defendant, however, continues to maintain Hawaii COLA can be properly considered (1) in pre-June 26, 1974, initial rate calculations and (2) in portions of the comparative test under 5 U.S.C. § 5333(b) for both pre- and post-June 26, 1974, periods.

There are, of course, additional reasons for not considering COLA as part of the basic rate of pay. I have merely underscored the more obvious reasons for rejecting the continued consideration of COLA as basic pay.

The majority repeatedly asserts that only by including COLA can a GS salary truly be compared with WS compensation. For example, the majority says:

> Further support for the reasonableness of the Navy's pre-June 26, 1974 interpretation can be found when one considers what pay rates are being compared. WS pay rates are based upon the prevailing rate in a specific geographic area. *By operation, WS pay rates necessarily include a cost-of-living allowance.* GS basic pay rates do not include COLA. Therefore, by adding COLA to the GS pay rates and then comparing the total to the WS pay rate, the Navy is comparing equivalents. [At p. 9, emphasis supplied.]

The majority's reasoning, obviously, assumes Hawaii COLA only reflects the higher cost of living in the Islands. But 5 U.S.C. § 5941 is clear that COLA may be based on either or both of *two* factors:

(1) higher living costs

(2) an allowance as a recruitment incentive.

We simply do not know on this record whether Hawaii COLA or WS wages paid in Hawaii reflect any added costs of recruitment. It may well be (so far as we *really* know) that a recruitment allowance is present in Hawaii COLA to attract white collar workers to Hawaii, but no such recruitment factor is reflected in WS wages paid in Hawaii because of an abundance of local blue collar workers. We simply do not know, and I therefore find no support for the majority's bald assertion that by including COLA, the Navy is comparing equivalents. Further, even if we assume Hawaii COLA reflects only the higher cost of living there, it still does not follow that by including COLA the Navy is comparing equivalents. The majority's assumption that WS employees' pay in general contains the higher cost-of-living factor is nothing more than a guess. If a WS employee's wage does contain this factor, what percent of his pay covers this factor? Is it 25 percent or 5 percent? If the coverage is only 5 percent, it is grossly erroneous to assume 5 percent is equivalent to 15 percent, the stipulated COLA rate in this case.

Moreover, I cannot agree with the majority's resolution of the substantial constitutional issues herein. In my view, defendant's COLA policies under 5 U.S.C. § 5334(a) and 5 U.S.C. § 5333(b) have irrationally created two sets or classifications of similarly situated but differently treated groups. The first such set consists of (1) those non-COLA, GS supervisors who are paid more than their subordinates and (2) those COLA, GS supervisors who are or were at times paid less than their subordinates. The second set of unequally and irrationally treated federal employees, created solely by defendant's policy and its refusal to apply the June 26, 1974, revision to plaintiffs, consists of (1) those COLA, GS supervisors who were promoted from WS to GS positions after June 26, 1974, and are therefore entitled to be paid

more than their counterparts and (2) those COLA, GS supervisors who were promoted from WS to GS positions prior to June 26, 1974, and are therefore paid less than their counterparts even though they may have greater seniority. In each of the foregoing groups of supervisors, the former group is the arbitrarily favored class.

As the majority points out, the critical test is whether there was a "rational basis" for the creation of these distinctions between similarly situated groups. I perceive no need to repeat the authorities which the majority cites to establish that proposition. Applying this rational basis test to the instant case, it is clear defendant's policy of considering COLA in determining plaintiffs' rate of basic pay is unlawful. With respect to the first set of unequally treated supervisors, there is certainly no defensible rationale for defendant's penalizing COLA, GS supervisors as against non-COLA, GS supervisors. A non-COLA supervisor's base rate clearly is his rate fixed by the GS schedule. So is that of the COLA, GS supervisor. But solely because Hawaii supervisors receive COLA, they have been denied an increase of their base rate (with all the benefits incident thereto) over their subordinates under 5 U.S.C. § 5333(b), while non-COLA supervisors with exactly the same base rates fixed by the GS schedule received these increases. The majority's argument that this distinction is rational is bottomed on the assumptions that "WS pay rates, by their nature, reflect the cost-of-living" and that "[t]he Navy's inclusion of COLA in the calculation was reasonably designed to compare equivalents." As pointed out above, neither assumption is supported by this record. Simply put, COLA and WS wages cannot be presumed equivalent and the majority's assumption therefore can provide no basis for the distinctions wherein some supervisors receive an increase in their base rate while some do not.

With respect to the second set of unequally treated COLA, GS supervisors, plaintiffs have been arbitrarily

and wrongfully penalized a second time. Although COLA, GS supervisors promoted to GS from WS positions after June 26, 1974, have enjoyed significant pay increases and incidental employment benefits caused thereby, plaintiffs, who were promoted prior to June 26, 1974, have been denied equal treatment even though their circumstances are identical. Defendant concedes that the effect of not applying the June 26, 1974, reversal in policy to plaintiffs has been an anomalous and inequitable pay situation where plaintiffs are discriminated against *vis-a-vis* later-promoted supervisors and plaintiffs' subordinates. There is no rational basis for this discrimination. Defendant's reasons for arbitrarily denying the increases to plaintiffs are apparently that there are not very many plaintiffs and that they will be replaced through attrition:

> Because the problem exists for only a limited number of employees, however, and since it will exist only until the current General Schedule supervisors are replaced, through attrition and refilling of the positions, it is not considered appropriate to request the Civil Service Commission to revise [the methods for computing these employees' pay]. [Letter from the Director, Office of Civilian Manpower Management, United States Navy, to the Regional Director, Office of Civilian Manpower Management, United States Navy (December 19, 1974).]

I know of no authority which allows unconstitutional treatment merely because the impacted class is numerically small. Wisely, the majority does not justify the distinction on this basis. Instead, the majority asserts that recognition of this equal protection claim would

> * * * inhibit any legislative or other govermental body from amending its statutes or regulations. Our laws would become written in stone, thereby failing to account for changing times and changing demands of our citizens. [At p. 16.]

The point of constitutional significance, however, is not whether an agency may change its interpretation of the controlling law. Obviously, the agency may. The constitutionally relevant point is whether, in implementing that change, the agency has acted in a manner creating arbitrary and unreasonable distinctions. Put another way, an agency may act, but must always act constitutionally. I cannot say the distinction drawn in supervisors' pay solely on the basis of when each was promoted is constitutionally permissible. In conclusion, I note the Supreme Court has long recognized construction of a statute (and presumably supporting regulations) should " 'go in the direction of constitutional policy.' " Regional Rail Reorganization Act Cases, 419 U. S. 102, 134 (1974), *citing United States* v. *Johnson*, 323 U. S. 273, 276 (1944). An agency, it seems to me, has an obligation to avoid implementing policies which raise even a colorable constitutional claim.

It follows from the foregoing that (1) the Navy improperly considered COLA in its 5 U.S.C. § 5334(a) calculations for pre-1974 periods and (2) the Navy improperly considered COLA in its 5 U.S.C. § 5333(b) calculations for all periods. I would allow the plaintiffs recovery, the amount of which would be determined under Rule 131(c). To repeat, I respectfully dissent.

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No. 82-541

In the Supreme Court of the United States

OCTOBER TERM, 1982

RALPH AH SAM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT (FORMERLY THE UNITED STATES COURT OF CLAIMS)

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Navy's practice of taking into account the cost of living allowance ("COLA") paid to a supervisory general schedule employee under 5 U.S.C. 5941(a) for purposes of comparing his salary to that paid to prevailing rate employees under his supervision validly implements the "highest paid subordinate" rule of 5 U.S.C. 5333(b).

2. Whether, prior to June 26, 1974, the Navy's application of the "highest previous rate" rule of 5 C.F.R. 531.203(c) to general schedule appointees entitled to COLAs was based on an unreasonable interpretation of that regulation and the underlying statute.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-28a) is reported at 599 F.2d 411.

JURISDICTION

The judgment of the Court of Claims was entered on May 19, 1982. On August 10, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to September 16, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. 5333 provides in pertinent part:

Minimum rate for new appointments; higher rates for supervisors of wage-board employees.

(a) New appointments shall be made at the rate of the appropriate grade.

* * * * *

(b) Under regulations prescribed by the Civil Service Commission, an employee in a position to which this subchapter applies, who regularly has responsibility for supervision (including supervision over the technical aspects of the work concerned) over employees whose pay is fixed and adjusted from time to time by wage boards or similar administrative authority as nearly as is consistent with the public interest in accordance with prevailing rates, may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate for his grade, as provided by the regulations.

5 U.S.C. 5334 provides in pertinent part:

Rate on change of position or type of appointment; regulations.

(a) The rate of basic pay to which an employee is entitled is governed by regulations prescribed by the Civil Service Commission in conformity with this subchapter and chapter 51 of this title when—

(1) he is transferred from a position in the legislative, judicial, or executive branch to which this subchapter does not apply.

* * * * *

(6) his employment status is otherwise changed; or

(7) his position is changed from one grade to another grade.

5 C.F.R. 531.203(c) (1974) provides in pertinent part:

Position or appointment changes. Subject to §§ 531.204, 531.515, 539.201 of this chapter, and section 5334(a) of title 5, United States Code, when an employee is reemployed, transferred, reassigned, promoted, or demoted, the agency may pay him at any rate of his grade which does not exceed his highest previous rate; however, if his highest previous rate falls between two rates of his grade, the agency may pay him at the higher rate. * * *

5 C.F.R. 531.305 (1974) provides in pertinent part:

Adjustment of rates.

(a) *Rate payable to supervisor.* (1) Except as provided in subparagraph (2) of this paragraph, when an agency decides to adjust the rate of pay for a supervisor under section 5333(b) of title 5, United States Code, and this subpart, it shall adjust his rate of pay to the nearest rate (but not above the maximum rate) of his grade which exceeds the highest rate of basic pay (excluding night differential) paid to any wage board employee for whom the supervisor regularly has responsibility for supervision.

(2) When a supervisor is in an area in which he receives a cost-of-living allowance or post differential based on hardship, and the wage board employee he supervises does not receive a separately stated cost-of-living allowance or post differential, the agency shall add to the supervisor's

rate of basic pay his cost-of-living allowance or post differential and use the total to adjust his rate of pay under subparagraph (1) of this paragraph.

* * * * *

STATEMENT

1. The two principal pay systems for federal employees are the General Schedule (GS) (5 U.S.C. (& Supp. V) 5331 *et seq.*) and the prevailing-rate Wage System (WS) (5 U.S.C. (& Supp. V) 5341 *et seq.*), which comprise most federal "white collar" and "blue collar" positions respectively. See generally *United States* v. *Clark*, 454 U.S. 555, 556-557 (1982). The GS is divided into 18 numbered grades, which are each subdivided into rates of pay, or "steps." 5 U.S.C. 5104, 5332. The salary for each step and grade of the GS is uniform nationwide. However, certain GS employees, including those stationed in areas outside the contiguous 48 states with "living costs substantially higher than in the District of Columbia," are entitled to a cost of living adjustment ("COLA") of up to 25% of their rate of basic pay pursuant to regulations prescribed by the President. 5 U.S.C. 5941(a)(1).[1] The WS is also divided into grades and subdivided into steps, but the rate of pay for each WS step is not uniform nationwide. Rather, it is based upon wage surveys of prevailing rates for comparable work in local wage areas. 5 U.S.C. (Supp. V) 5343. Because differing costs of living are already taken into account in setting basic

[1] Regulations promulgated by the Office of Personnel Management define the "rate of basic pay" as "the rate of pay fixed by law or administrative action for the position held by any employee before any deductions and exclusive of additional pay of any kind." 5 C.F.R. 531.201(i).

WS pay rates, there is no provision for separate COLAs in the WS.

As a general rule, when a WS employee changes to a GS position, his salary is determined under the "highest previous rate" rule of 5 C.F.R. 531.203(c) (1974), which provides that "when an employee is reemployed, transferred, reassigned, promoted or demoted, the agency may pay the employee at any rate of the grade which does not exceed his or her highest previous rate: however, if the employee's highest previous rate falls between two rates of his or her grade, the agency may pay him or her at the higher rate." [2] In some areas, prevailing rates are sufficiently high that a GS supervisory appointee, even after application of the "highest previous rate" rule, might be placed at a salary level lower than his WS subordinates. In 1962, to alleviate management problems caused by such a "pay inversion" (Pet. App. 2a), Congress enacted 5 U.S.C. 5333(b). That statute provides that, pursuant to regulations to be promulgated, a GS employee who regularly supervises WS employees "may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised, or at the maximum rate of his grade." This "highest paid subordinate" rule operates independently of the "highest previous rate" rule and may in some cases result in an additional upward adjustment of the starting GS salary.

2. Petitioners are five past and present civilian employees of the Pearl Harbor Naval Shipyard in

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[2] The Court of Claims referred to the 1974 version of the highest previous rate rule (see Pet. App. 3a n.1), and therefore we will also refer to that version. The present version does not differ from that version in any aspect material to this case.

Hawaii who were transferred or promoted from WS positions to GS supervisory positions before June 26, 1974 (Pet. App. 5a-6a). Because the cost of living in Hawaii is substantially higher than it is in the District of Columbia, GS employees in that state generally are paid COLAs pursuant to 5 U.S.C. 5941(a)(1) and Exec. Order No. 10000 (as amended) (reprinted at 5 U.S.C. 5941 note). See 5 C.F.R. 591.203 (1974); 5 C.F.R. 591.207 and App. A; Pet. App. 6a. The present dispute stems from petitioners' disagreement with the manner in which the Navy took these COLAs into account in computing their starting GS salaries under the "highest previous rate" rule and the "highest paid subordinate" rule.

a. With respect to the highest paid subordinate rule, the Navy has at all relevant times followed the practices specified in 5 C.F.R. 531.303, 531.304, and 531.305 (1974) (see Pet. App. 4a-5a n.2). Section 531.303 provides that in deciding whether to increase a supervisor's salary under the discretionary authority of 5 U.S.C. 5333(b), an agency shall consider both (a) the relative rate-ranges of the supervisor and the prevailing rate employee supervised by him, and (b) the equities among supervisors in the same organizational entity, as well as those between the supervisor and WS employee in question. Section 531.304(d) requires a determination that the supervisor's rate of basic pay is less than the rate of basic pay of some WS subordinate as a prerequisite to applying the highest paid subordinate rule, and Section 531.305 deals with calculating the GS pay rate for those purposes. In particular, Section 531.305(a)(2) specifies how COLAs are to be treated:

> (2) When a supervisor is in an area in which he receives a cost-of-living allowance or post differential based on hardship, and the wage board employee he supervises does not receive a separately stated cost-of-living allowance or post differential, the agency shall add to the supervisor's rate of basic pay his cost-of-living allowance or post differential and use the total to adjust his rate of pay under [the highest paid subordinate rule].

In accordance with these regulations, the Navy added to petitioners' rates of basic pay the COLA applicable for Hawaii (Pet. App. 13a-15a). If the COLA and rate of basic pay taken together yielded a total amount that was greater than the salary of the highest paid subordinate, no further adjustment was made. If the total was less than the salary of a WS subordinate, the Navy adjusted the supervisor's salary to a level at which his total salary, including the COLA, exceeded that of the WS subordinate (*id.* at 15a).

b. Until 1974, the Navy treated COLAs similarly in determining the initial rates of supervisors' pay for purposes of the highest previous rate rule of 5 C.F.R. 531.203(c) (1974). In applying that rule in connection with a transfer from the WS to the GS, the employee's highest previous rate of pay under the WS was compared to his new GS salary, including the Hawaii COLA (Pet. App. 7a). If the employee's highest previous rate of pay exceeded the new GS salary including the COLA, the Navy would raise the rate of GS basic pay to a step at which that pay plus the COLA would exceed the employee's highest previous pay rate (Pet. App. 8a). After June 26, 1974, the Navy altered its interpretation of Section 531.203(c) and began comparing the previ-

ous WS rate of basic pay to the new GS rate without regard to the COLA (*ibid.*). Under the new interpretation, the Navy first adjusted the employee's GS rate upward to equal or exceed the highest previous rate paid to him under the WS and then added the COLA to establish his total compensation.

3. Petitioners, who were originally joined by several other similarly situated employees, filed a group grievance in 1975 with the Shipyard Commander for submission to the Civil Service Commission. They protested the Navy's refusal to readjust their salaries by applying the 1974 reinterpretation of the highest previous rate rule retroactively to promotions that occurred when the previous interpretation was in effect. Petitioners also challenged the Navy's consideration of their COLAs when applying the highest paid subordinate rule. They contended (see Pet. App. 15a-16a) that 5 U.S.C. 5333(b) requires the Navy to compare the basic pay rate (excluding COLAs) of the GS supervisory position to that of the highest-paid WS subordinate; if the GS rate is lower than that of the subordinate, the GS rate should be increased by the COLA (see 5 C.F.R. 531.305(a)(2)(1974)) and the total keyed to the next highest GS step level. Under petitioners' suggested computation, that figure would represent the supervisor's basic pay, and he would be entitled to the applicable COLA in addition. The Navy's methodology was upheld at the administrative level.

Eight supervisors then filed suit in the United States District Court for the District of Hawaii (Pet. App. 6a). Thereafter, the suit was transferred to the Court of Claims, with respect to five of the eight original plaintiffs, pursuant to 28 U.S.C. 1406(c) (Pet. App. 6a). In addition to challenging

the Navy's interpretation of the controlling statutes and regulations, petitioners contended in the Court of Claims that the Navy's differential treatment of GS supervisors who do and who do not receive COLAs, and of GS supervisors promoted from WS positions before and after June 26, 1974, both were violations of equal protection. On May 19, 1982, a divided panel of the Court of Claims entered judgment for the United States.

The Court of Claims rejected petitioners' statutory challenge to the Navy's pre-June 1974 interpretation of the highest previous rate rule. Observing that both the statute and the regulation (5 C.F.R. 531.203(c) (1974)) are silent as to the treatment of COLAs, the court held that the Navy's original interpretation was one of several reasonable and acceptable ways of applying the rule (Pet. App. 9a-13a). The court further explained that 5 U.S.C. 5333(b), which establishes the highest paid subordinate rule, is similarly silent with respect to COLAs, and it concluded that the Navy's decision to include COLAs in the GS to WS comparison for purposes of this rule was also reasonable (Pet. App. 13a-17a). The court noted in this regard that the Navy's treatment of COLAs under the highest paid subordinate rule was in conformity with the regulatory guidelines of the Civil Service Commission, the agency principally responsible for implementing the statute (*id.* at 17a). Finally, the court rejected both of petitioners' equal protection arguments. With respect to the different treatment of the employees covered by the Navy's pre-1974 interpretation of the highest previous rate rule, the court explained that changes in the law generally are prospective and stated that

it would "effectively inhibit any legislative or other governmental body from amending its statutes or regulations" (*id.* at 19a) if prospective changes in entitlement laws were deemed to violate equal protection guarantees (*id.* at 12a, 18a-19a). The court also found rational, and thus upheld as constitutionally permissible, the decision to include supervisors' COLAs in their rate of pay for purposes of applying the highest paid subordinate rule (*id.* at 19a-20a). The court explained (*id.* at 20a):

> Cost-of-living allowances are designed to offset the expense incurred by GS employees living and working in high cost areas. WS pay rates, by their nature, reflect the cost of living. The Navy's inclusion of COLA in the calculation was reasonably designed to compare equivalents.

Judge Kashiwa dissented (*id.* at 21a-28a).[3]

ARGUMENT

Petitioners contend (Pet. 5-9) that they are entitled to a pay adjustment because the Navy erroneously considered their COLAs, in two different respects, for purposes of setting their GS pay rates. These contentions were correctly rejected by the Court of Claims. Moreover, the decision below is of limited prospective importance, and it does not conflict with any decision of this Court or a court of appeals. Accordingly, review by this Court is unwarranted.

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[3] Petitioners had also argued that the Navy erred in applying the highest previous rate rule rather than giving them an automatic "two-step increase" in computing their starting GS salaries. The Court of Claims summarily rejected this contention on the authority of this Court's intervening decision in *United States* v. *Clark*, *supra* (Pet. App. 6a-7a).

1.a. Petitioners contend (see Pet. 6-7; Pet. App. 7a, 13a) that the Navy was strictly bound by 5 U.S.C. 5333(b) to compare the basic rates of pay of GS supervisors and their highest paid WS subordinates for purposes of the highest paid subordinate rule without regard to COLAs. This contention is without merit.

Section 5333(b) provides that a GS supervisor "may be paid at one of the rates for his grade which is above the highest rate of basic pay being paid to any such prevailing-rate employee regularly supervised * * *." Petitioners insist (Pet. 6-7) that this language requires that all comparisons and adjustments must be made strictly on the basis of the respective rates of basic pay (excluding COLAs) for the WS and GS positions being compared. But Section 5333(b) contains no such command. As the Court of Claims recognized (Pet. App. 9a), the statute is completely silent with regard to COLAs. It specifies only that an agency may adjust the salary of a GS supervisor to some rate of pay that exceeds the "basic rate of pay" of the WS subordinate. In the words of the Court of Claims (*id.* at 11a), nothing in the statute "dictates that COLA cannot be used to compute or establish the rate of basic pay to which a GS employee would be entitled" to accomplish that end.

The Navy's decision to consider the COLA in setting the appropriate rate of pay for GS employees is entirely reasonable given the nature of the WS and GS systems. The payment of a COLA is unusual in the GS and applies to relatively few employees, and it is understandable that the treatment of COLAs was not specifically addressed by Congress in Section 5333(b). COLAs are paid to petitioners

and other GS employees in Hawaii because the cost of living in that state is inordinately high. See 5 U.S.C. 5941(a)(1); Exec. Order No. 10000, *supra*; 5 C.F.R. 591.203 (1974); 5 C.F.R. 591.207.[4] But WS pay rates, unlike GS pay rates, are based directly on the prevailing rates of local wage areas and thus, in high cost areas like Hawaii, already have a built-in COLA. Therefore, when the Navy includes COLAs in comparing GS salary levels in Hawaii to the rates paid to subordinate WS employees, it "is comparing equivalents" (Pet. App. 11a; see also *id.* at 20a). Moreover, the Navy's treatment of COLAs in its highest paid subordinate adjustments is prescribed by 5 C.F.R. 531.305(a)(2) (1974). Section 5333(b) requires that rates be adjusted according to regulations prescribed by the Civil Service Commission (now OPM), and the "courts should defer to an agency's construction of its own statutory mandate" unless it is unreasonable or obviously incorrect. *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978). See generally *United States* v. *Clark*, *supra*.

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[4] Judge Kashiwa observed in dissent that COLAs may be paid under 5 U.S.C. 5941(a) either because the relevant location has a substantially higher cost of living than the District of Columbia, or because environmental conditions in the area are adverse and warrant the payment of a recruiting incentive. Judge Kashiwa rejected the Navy's approach largely because of his belief that it was unknown to what extent the COLA paid to GS employees in Hawaii was based on the cost of living factor (Pet. App. 24a-25a). The controlling regulation (5 C.F.R. 591.203 (1974)) makes clear, however, that the COLA for Hawaii was indeed based on the high cost of living in that state, rather than intended as a recruitment incentive. Compare also 5 C.F.R. 591.207 with 5 C.F.R. 591.209.

The Navy's treatment of COLAs under the highest paid subordinate rule is also fully consonant with the congressional purpose underlying the establishment of that rule. Congress was concerned about "[i]nequities [that] exist[ed] among the various Federal pay systems" because "supervisors under the [GS] system are sometimes paid less than their subordinates who are under a wage board system." S. Rep. No. 2120, 87th Cong., 2d Sess. 5 (1962). This problem was attributed to a "lack of coordination between the systems." *Ibid.* The enactment of Section 5333(b) was intended to "ameliorate" the problem of pay inversion by affording agencies limited discretion to raise a GS supervisor's salary above that of his prevailing rate subordinates. See House Comm. on Post Office and Civil Service, 87th Cong., 2d Sess., *Statement of Purpose and Justification and Section-by-Section Analysis of the Legislature Requested by the President of the United States to Reform the Major Federal Statutory Salary Systems* 9-10, 20 (Comm. Print 1962). In short, the purpose of the statute is simply to provide a means of coordination between the two pay scales in order to afford a GS supervisor greater remuneration than his WS subordinates. The approach taken by the Navy and OPM regulations plainly accomplishes this purpose.[5] By contrast, petitioners' suggested method of computation would provide a windfall benefit to GS supervisors, one that has no connection with the stat-

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[5] Petitioners carefully state (Pet. 4) that the Navy's practice afforded them "a lower initial rate of pay and a lower rate *vis-a-vis* their WS subordinates than if COLA had not been added for pay comparison." Petitioners do not and cannot claim that the Navy's approach caused them to receive lower total remuneration than their WS subordinates.

utory purpose, by awarding them the amount of the COLA twice (see Pet. App. 15a-16a).[6]

b. Petitioners also contend (Pet. 6-7) that the Navy's pre-1974 practice of including COLAs in the GS salary when applying the highest previous rate rule violates the statute. This contention is similarly without merit. As with the highest paid subordinate rule, the highest previous rate rule of 5 C.F.R. 531.203(c) (1974) is silent with regard to COLAs. The Navy altered its interpretation of that rule on June 26, 1974, to provide that COLAs would be added only after applying the rule to establish the

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[6] Petitioners' contention that the Navy's computation unconstitutionally discriminates against GS supervisors who are entitled to COLAs is insubstantial. First, the Navy should not even be regarded as treating the two classes of supervisors differently. In each case—whether or not the GS supervisor in question is receiving a COLA—his "total remuneration" (Pet. App. 13a) is compared to the salary received by the highest paid subordinate. Even if the Navy's inclusion of COLAs in the calculation is somehow regarded as discrimination against supervisors in Hawaii on the theory that it denies them a salary adjustment based on their basic rate of GS pay standing alone, no constitutional problem would be posed. The Constitution permits different classes of persons to be treated differently under an entitlement statute so long as there is a rational basis for the distinction. See, *e.g.*, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314-317 (1974); *McGowan* v. *Maryland*, 366 U.S. 420, 425-427 (1961). Here, there can be no doubt that there is a rational basis for considering for comparison purposes only the basic rate of pay of GS supervisors not entitled to COLAs, while adding to the rate the COLAs of those supervisors who do not receive them, since the Navy's approach results in "comparing equivalents" (Pet. App. 11a) and is calculated in both cases to afford the GS supervisor an adjusted rate of total remuneration above that of his WS subordinates.

GS entry level on the basis of the previous WS rate. But as the Court of Claims explained (Pet. App. 10a-11a), the Navy's adoption of a more liberal approach at that time did not render its earlier interpretation unreasonable. The court correctly invoked the principle that a reasonable administrative interpretation of a statute should be upheld, "even though the agency conclusion is not the only reasonable one or even the one the court would have reached if the question had arisen in the first instance in judicial proceedings" (Pet. App. 10a, citing *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965)).

Indeed, the highest previous rate rule requires only that a transferred or promoted employee ordinarily be paid "at any rate of grade which *does not exceed* his highest previous rate" of WS pay. 5 C.F.R. 531.203(c) (1974) (emphasis added). Whether or not a promoted or transferred employee is to be paid at the "higher rate" if his converted WS salary falls between two rates of the appropriate GS grade is left by Section 531.203(c) entirely to the discretion of the employing agency. The Navy was free, under any reading of Section 531.203(c), to pay petitioners a GS salary equal to or lower than that they had previously received as prevailing-rate employees. The Navy's approach of paying transferees from the WS to the GS "higher" salaries only after COLAs were taken into consideration thus was squarely within the range of its discretion under the highest previous rate rule.[7]

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[7] Petitioners' contention (Pet. 5-7) that the decision below is inconsistent with this Court's decision in *United States* v. *Clark*, *supra*, is frivolous. The only issue in this case controlled by *Clark* is whether petitioners were entitled on their promotions from the WS to the GS to have their rates of

2. Apart from the correctness of the decision below, further review is unwarranted here because of the limited impact of the decision. Petitioners' complaints about the Navy's treatment of COLAs under the highest previous rate rule apply only to transfers

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pay determined initially under the "two-step increase" rule of 5 U.S.C. 5334(b). The Court of Claims stayed its decision in this case until this Court decided *Clark*, and then it resolved the question against petitioners in direct compliance with this Court's disposition of *Clark* (Pet. App. 7a). Petitioners do not explain how *Clark* provides a basis for resolving in their favor the other issues presented here concerning the consideration of COLAs. To the contrary, no aspect of the decision below is even arguably inconsistent with the letter or the spirit of *Clark*.

By the same token, none of the authorities on which petitioners rely (Pet. 8 n.5) supports the claim that COLAs may not be added to the rate of basic pay for pay adjustment determinations. *Shadduck* v. *United States*, 142 Ct. Cl. 516 (1958), held that a federal employee in transit from Hawaii to a reappointment on the mainland was not entitled to a COLA while on annual leave status outside Hawaii. *Kalv* v. *United States*, 128 Ct. Cl. 207 (1954), held that a serviceman entitled to back pay for a wrongful removal from an overseas position for which a post differential was paid was not entitled to have the differential included in the award. *Curlott* v. *Campbell*, 598 F.2d 1175, 1177 (9th Cir. 1979), involved only whether due process required the Civil Service Commission to afford plaintiffs a hearing before deciding to reduce COLAs in Alaska for a certain class of employees. Finally, Federal Personnel Manual 591(4-1)(d)(1) (1969) merely provides that COLAs or differentials paid to a GS employee may not be treated as part of the employee's base pay for purposes of "computing overtime pay, night differential, holiday pay, retirement deductions, *or any other additional pay, allowance, of pay differential*" (emphasis added). To the extent that that guideline has any import in this case, it *supports* the Navy's decision not to consider COLAs for the quite different purposes of performing the two adjustments at issue here.

that occurred more than eight years ago. To the extent any similar grievances are outstanding, they are limited to a discrete class of civilian Navy employees transferred or promoted from WS to GS positions in the State of Hawaii prior to June 26, 1974—a class that necessarily will continue to become smaller over time. Even the practice of which petitioners complain that is still ongoing, namely, taking COLAs into account before applying the highest paid subordinate rule of 5 U.S.C. 5333(b), is of quite limited scope. It has no application whatsoever in the contiguous 48 states, where no COLAs are paid. See 5 U.S.C. 5941(a); Pet. App. 22a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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